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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 155

FRANK COSTELLO,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming an order of the District Court overruling his plea of self-incrimination and fining him for his refusal to answer questions in an oral examination before trial.

Opinions Below

The opinions of the District Court are set forth at pages 31 and 37 of the record herein. Judge McGohey's decision is reported in 16 F.R.D. 428. The opinion of the Court of Appeals is not yet reported and is set forth at page 11 of the Appendix herein.

Jurisdiction

The judgment of the Court of Appeals was entered on May 10, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether petitioner may assert the privilege of self-incrimination with respect to his acquaintances, occupation, income, premises leased by him, aliases and arrests in 1925 and prior thereto, where he is the subject of a net worth income tax criminal prosecution and is charged in denaturalization proceedings with participation in "illicit liquor business and other illegal activities" and a continuing prospective intent at the time of naturalization (without limitation as to crimes or dates after 1925) to violate Federal and State Income Tax laws and other State and Federal laws.

2. Whether the achievement of a [illegible] conspiracy in 1925 conclusively terminates such conspiracy, places it within the bar of the statute of limitations, thereby precludes the bona fide need for the assertion of the privilege of self-incrimination respecting the facts underlying such conspiracy.

3. Whether the decision below, rendered prior to *Emspak* v. *United States* (No. 9, October Term, 1954) is inconsistent therewith.

4. Whether a District Court may overrule a plea of self-incrimination without a hearing.

Constitutional Provisions Involved

There is here involved the Fifth Amendment to the United States Constitution as it relates to the protection against self-incrimination.

Statement

Denaturalization proceedings were instituted against petitioner on October 29, 1952 (R. 1).

The complaint herein charges petitioner with the illegal and fraudulent procurement of naturalization in 1925 in that at the time of naturalization defendant's oath of allegiance was false and was taken (R. p. 3; par. 4 of complaint):

> "with mental reservation to violate and continue to violate the Eighteenth Article of Amendment of the United States Constitution, the National Prohibition Act * * * Federal and State Income Tax laws and other State and Federal laws."

It is further charged that petitioner procured his naturalization fraudulently by misrepresentations that his two witnesses, Fr[illegible]s and Harry C. Sausser, knew petitioner to be of good moral character.

> "* * * as the two said witnesses knew that the defendant was engaged in immoral, illegal and Constitutional violating activities, namely, gambling, illicit liquor business, and other illegal activities." (Par. 5 of Complaint).

Respondent served petitioner's attorneys with a notice, dated July 27, 1954, seeking to take petitioner's deposition before trial (R. 19). Petitioner appeared, and then refused to answer questions upon the claim that he might incriminate himself (R. 21).

The examination sought of petitioner included questions as to the (1) Identity of witnesses to his naturalization (2) Persons acquainted with him (3) His arrests (4) His occupation prior to naturalization (5) His income prior to

naturalization (6) Premises or leases held prior to naturalization and (7) Use of aliases (R. 22, 26-27).

Respondent moved to compel petitioner to answer (R. 28). Petitioner requested a hearing to demonstrate the *bona fides* of his plea of self-incrimination (R. 30). The District Court directed petitioner to answer the propounded questions without a hearing on the issue involved, stating:

> "Defendant's attorney says his client's answer will furnish a link in a chain of evidence that may lead to federal prosecution for perjury, conspiracy, income tax evasion, and other crimes. It is defendant's task to justify his refusal to answer and asserting this litany of crimes is not enough. It does not appear that he ever has been charged with any conspiracy illegally to procure his naturalization. If he participated in one it terminated with his admission to citizenship. *Krulewitch* v. *U. S.*, 336 U. S. 440. Prosecution for any criminal feature of the prosecution of his petition for naturalization has long been outlawed under the Limitations Statute, 18 U. S. C. A. 1382. So has prosecution for perjury, income tax evasions or any other crime he may have committed in 1925, or earlier if he committed any."

Thereafter, petitioner continued in his refusal to answer questions upon the ground of self-incrimination (R. 25). Respondent then moved (R. 32), to strike petitioner's answer and render judgment by default.

The District Court refused to strike petitioner's answer but instead fined him $500.00 (R. 37-42). Both parties appealed (R. 43). The Circuit Court affirmed both appeals (Appendix, p. 11, *infra*). The Circuit Court ruled that:

> "True, the statute does not run against a conspiracy until the conspiracy ends. But any criminal conspiracy for fraud in obtaining his naturalization

necessarily had terminated on the achievement of that objective and hence had long since been barred. And in the absence of some basis for a contrary inference, the possibility of Costello's participation in any other criminal conspiracy which had continued for such a long span of time that it was not yet barred but was still subject to prosecution, was too remote to support a bona fide need for the assertion of the privilege."

Reasons for Granting the Writ

The respondent seeks to compel petitioner to describe his associates, acquaintances, business activities, leases, income, arrests, and aliases in 1925. This will be utilized as the complaint herein shows, to establish that petitioner fraudulently conspired to secure naturalization, was engaged in criminal activities in 1925 and intended *thereafter* to violate income tax and other unnamed federal laws; (R. 2, 3, par. 3, 4, 6). The record herein does not show the "setting of possible incrimination" in view of the District Court's refusal to conduct a hearing to show this background although requested to so do (R. 30). The Court of Appeals, however, took judicial notice (Appendix, herein, pp. 16, 18), of an announcement of Attorney General McGranery in October, 1925 that petitioner, Frank Costello would be required to pay his debt to society,[1] of the Kefauver Report (Senate Report 307, 82d Congress, 1st Session, pp. 111-124) that Costello is one of the king-pins in a major crime syndicate in the United States,[2] and of the recent

[1] The Washington Post reported on October 3, 1952, that:

"In listing the underworld targets, McGranery indirectly took note of fears expressed by Senator John J. Williams (R. Del.) that Frank Costello might be deported before he could be used to testify against other racketeers."

"McGranery gave assurance that none of those involved would be deported until each has 'paid his debt to society.'"

[2] On May 23, 1955 in a speech in Detroit, Attorney General Brownell described Costello as probably "one of the most influential figures in organized crime in the whole country."

income tax prosecutions against him (Appendix herein p. 18).

1. In the setting noted above, proof of past criminal activities, past associates engaged in crime and past illegal income, could necessarily forge the link in the chain establishing present criminality. Refusal to answer questions as to past membership in the Communist Party have been sustained by the Court upon this theory. *Blau* v. *United States,* 340 U. S. 332 (1951) upheld the refusal to answer questions as to whether the defendant had *ever* been a member of the Communist Party. *United States* v. *Zwillman,* 108 F. 2d 802, 803 (C. A. 2, 1940) quoted with approval in footnote 24 of the majority opinion in *Emspak* v. *United States,* (No. 9, Oct. Term, 1954) upheld the privilege in response to questions as to business associates between 1928 and 1932. *Carroll* v. *Savoretti,* 220 F. 2d 910 (C. A. 5, 1955) upheld the refusal to answer whether the defendant was a member of the Communist Party prior to naturalization in 1928. In *Aiuppa v. United States,* 201 F. 2d 287 (C. A. 6, 1952) and *Poretto* v. *United States,* 196 F. 2d 392 (C. A. 5, 1952) refusal to answer questions, as here, as to whether the defendants knew named individuals was upheld.

Obviously, answers to questions as to income, leases, and business activities in 1925 have important tax implications in establishing a net worth starting point if further income tax prosecutions are undertaken against Costello. It should be observed that the Attorney General stated in Detroit, on May 23, 1955, that it was necessary to trace Costello's financial affairs from 1937 on to prove tax evasion in 1947-1949.

If past membership in the Communist Party (prior to 1940) at a time when it was not a crime [*Brunner* v. *United States,* 343 U.S. 918 reversing 190 F. 2d 167 (C.A. 9)] may

have the safeguard of the Fifth Amendment, then past criminal activities alleged here have, at least, an equal protection.

The decision below (rendered prior to *Emspak* v. *United States, supra*) is therefore not only in conflict with other circuits but is contrary to this Court's rulings in *Emspak* v. *United States, supra; Blau* v. *United States, supra;* and *Brunner* v. *United States, supra.* This conflict and the recurrence of this important constitutional problem warrant the grant of certiorari herein.

2. The narrow grounds of the decisions by the District Court and the Court of Appeals were twofold. *First,* it was asserted that any conspiracy to violate our naturalization laws necessarily ended in 1925 with the successful attainment of petitioner's naturalization. This is directly contrary to the views of other circuits. *Skelly* v. *United States,* 76 F. 2d 483, 488-489 (C. A. 9, 1935) *cert. denied,* 295 U.S. 757; *Lew Moy* v. *United States,* 237 Fed. 50, 52 (C. A. 8, 1916). The decisions below overlooked the charge frequently made [but not alleged in the indictment in *Krulewitch* v. *United States,* 336 U.S. 440 (1948)] that a criminal conspiracy may include a purpose to avoid detection and to frustrate prosecution after its successful conclusion. This is recognized in many state court decisions. *State* v. *Dilley,* 44 Wash. 207 (1906) and *Commonwealth* v. *Smith,* 151 Mass. 491 (1890).[3]

Secondly, the Court below conclusively presumed, without any basis therefor, that any other criminal conspiracy beginning in 1925 was barred by the statute of limitations. (Appendix herein p. 18.) If the Government may go back thirty years seeking to revoke Costello's citizenship, what

[3] See also cases collected in Government's Brief, *Krulewitch* v. *United States,* No. 143, Oct. Term, 1948, 336 U.S. 440. That a criminal conspiracy may include a purpose to avoid detection is said by the Government to be the general and long establish rule in state courts.

would prevent it from going back so far to establish a continuing criminal conspiracy on his part?

The decision below is directly contrary to view of the Second Circuit expressed in *United States* v. *Zwillman*, 108 F. 2d 802, 803 (C.A. 2, 1940) where it was said:

> "Evidence necessary to show that defendant was engaged in a conspiracy during the years from 1928 to 1932 might well be supplied by proof of the names of business associates engaged in violating the laws relating to the manufacture or sale of liquor. If a conspiracy was shown in those earlier years, it would continue unless abandoned, and the defendant would have to prove abandonment in order to take advantage of the statute of limitations. *Hyde* v. *United States*, 225 U. S. 347, 308-310 * * * *United States* v. *Rollnick*, 2 Cir. 91 F. 2d 911, 918; *Coates* v. *United States*, 9 Cir., 59 F. 2d 173, 174. The defendant claims, and we think with fair reason, that the answers sought would be a link in the chain of incriminating testimony and that he ought not to be compelled to give them—at least if he could show that he was likely to be endangered by answering."

Other circuits have likewise held that a conspiracy once established is presumed to continue until the contrary is established. *Marino* v. *United States*, 91 F. 2d 691, 695 (C.A. 9, 1937) *Coates* v. *United States*, 59 F. 2d 173, 174 (C.A. 9, 1932).[4] In conflict with this view is that taken below that Costello's participation in any conspiracy to evade income tax laws, liquor laws, and other federal laws in 1925 has necessarily been terminated. Do the Government and the court below concede therefore that Costello has long since ceased conspiring to violate federal laws?

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[4] The act of a conspirator is chargeable to his co-conspirator no matter when committed. *Pinkerton* v. *United States*, 328 U.S. 640, 646 (1945).

Recent announcements of the Attorney General point to the contrary. Moreover, the decision below is contrary to *Emspak* v. *United States, supra,* which states:

> "If an answer to a question may tend to be incriminatory, a witness is not deprived of the protection of the privilege merely because the witness if subsequently prosecuted could perhaps refute any inference of guilt arising from the answer."

To successfully defend a charge of criminal conspiracy existing in 1925 and thereafter to violate income tax, liquor laws and other federal laws, petitioner would have the burden of alleging and establishing his timely withdrawal therefrom to the satisfaction of a jury. *Hyde* v. *United States,* 225 U. S. 347 (1911); *Sperry Gyroscope* v. *N. L. R. B.,* 129 F. 2d 922, 927, 928 (C.A. 2, 1942). That Costello might thus plead and refute any inference of guilt arising from his answers does not as in the *Emspak* case deprive him of the privilege's protection.

3. The issue of self-incrimination will be one of continuing importance in denaturalization cases especially in view of the present practice of the Government of interrogating citizens before instituting revocation proceedings, then calling them for examinations before trial and finally producing them as the first witness at the denaturalization trial. The validity of the subpoena power in advance of the denaturalization action is before this Court in two cases in which certiorari has been granted. *United States* v. *Minker* (No. 625, Oct. Term, 1954) and *Falcone* v. *Barnes* (No. 716, Oct. Term, 1954). In *Lansky* v. *Savoretti,* 220 F. 2d 906, 910 (C. A. 5, 1955) and *Carroll* v. *Savoretti,* 220 F. 2d 910 (C. A. 5, 1955) the Fifth Circuit has assured those who are the subjects of the Government's denaturalization program that they will have the full benefit of the Fifth Amendment. The decision below, however, is in complete conflict with *Carroll* v. *Savoretti, supra.* To assure uniformity

of decision in maintaining the protection of the Fifth Amendment in denaturalization cases and in all other proceedings certiorari should be granted.

4. The District Court conducted no hearing to ascertain the "setting of possible incrimination" although requested to do so or to take judicial notice of the background facts. (R. 30). The importance of this setting has been emphasized by recent decisions of this Court. *Hoffman* v. *United States*, 341 U.S. 479 (1951); *Emspak* v. *United States, supra.*

It is undisputed that no hearing was here held to develop the setting. The District Court (R. 31) opinion makes it evident that judicial notice of the background facts were not taken. In the exercise of its supervisory powers this Court should instruct the lower courts relative to the proper procedures to follow in developing the "setting of possible incrimination". We submit that a hearing is required unless the background facts are acknowledged or the hearing waived. Neither situation prevailed in the District Court.

Conclusion

It is respectfully submitted that a writ of certiorari should be granted.

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